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No. 91-1548

In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN,
SECRETARY OF COMMERCE, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

The three-judge district court in this case held that the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. 141) permit the Secretary of Commerce to include federal military and civilian personnel stationed abroad (and their dependents) in the state population totals on which the apportionment of Representatives is based. However, the court held that the Secretary's manner of doing so following the 1990 census was arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), because he did not furnish an adequate justification. The questions presented are:

1. Whether judicial review of the apportionment of Representatives, based on the census including federal personnel abroad, is barred by virtue of the political question doctrine, the APA's exceptions for situations in which "statutes preclude judicial review" and "agency action is committed to agency discretion by law," 5 U.S.C. 701(a), and the inapplicability of the APA to the President.

2. Whether, if judicial review is not barred, the inclusion of federal personnel stationed abroad was arbitrary and capricious.

3. Whether, if the Secretary's determination violated the APA, the district court properly ordered petitioners to effect a new apportionment of Representatives with the personnel abroad thrown out of the underlying census count, rather than remanding the matter to the Secretary for further proceedings.

PARTIES TO THE PROCEEDINGS

The petitioners herein, who were defendants in the district court, are Barbara Franklin, Secretary of Commerce (substituted as a party pursuant to Rule 35.3 of this Court); Mark Plant, Acting Under Secretary of Commerce for Economic Affairs (also substituted pursuant to Rule 35.3); the Bureau of the Census; Barbara Bryant, Director of the Bureau of the Census; and George Herbert Walker Bush, the President of the United States. Donnald K. Anderson, the Clerk of the United States House of Representatives, also was a defendant in the district court.

The respondents in this Court, who were the plaintiffs below, are the Commonwealth of Massachusetts and two of its registered voters, Edward F. Berlin and Karen J. Kepler.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	4
Conclusion	7
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Board of Regents of the University of Texas Sys. v. *New Left Education Project*, 404 U.S. 541 (1972)	6
Stainback v. *Mo Hock Ke Lok Po*, 336 U.S. 368 (1949)	6
Turner v. *City of Memphis*, 369 U.S. 350 (1962)	6
United States v. *Nixon*, 418 U.S. 683 (1974)	5
United States Department of Commerce v. *Montana*, No. 91-860 (argued Mar. 4, 1992)	3
Wilentz v. *Sovereign Camp, Woodmen of the World*, 306 U.S. 573 (1939)	6

Constitution and statutes:

U.S. Const.:	
Art. I:	
§ 2, Cl. 3 (Census Clause)	2, 3
§ 8, Cl. 18	2
Amend. XIV:	
§ 2	2
§ 5	2
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*	3
5 U.S.C. 701(a)	4
5 U.S.C. 701(a)(2)	3

Statutes—Continued: Page

Census Act, 13 U.S.C. 141 3
13 U.S.C. 141(a) 2
13 U.S.C. 141(b) 2
2 U.S.C. 2a 2, 3, 4
28 U.S.C. 1253 ..... 5, 6
28 U.S.C. 1254(1) 5
28 U.S.C. 1291 ..... 5, 6
28 U.S.C. 2284(a) 5

Miscellaneous:

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 6

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No.

BARBARA FRANKLIN,
SECRETARY OF COMMERCE, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Secretary of Commerce and the other Executive Branch defendants below, respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the First Circuit in this case. This petition seeks review of the judgment of the United States District Court for the District of Massachusetts. It is filed on a protective basis, should the Court conclude that it does not have jurisdiction over the direct appeal that petitioners have taken pursuant to 28 U.S.C. 1253 from the same judgment of the district court. *Franklin* v. *Massachusetts*, prob. juris. noted, No. 91-1502 (Mar. 20, 1992).

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-84a)[1] and its order denying reconsideration and a stay (J.S. App. 85a-93a) are not yet reported.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 94a-96a) was entered on February 20, 1992. The protective notice of appeal to the First Circuit was filed on March 16, 1992 (App., *infra*, 1a-2a), and the appeal was docketed in the First Circuit on March 20, 1992. No. 92-1309. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See pages 5-6, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2, Clause 3 and Section 8, Clause 18 of Article I of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment; 2 U.S.C. 2a; and 13 U.S.C. 141(a) and (b), are reproduced at J.S. App. 99a-103a.

STATEMENT

Respondents brought this action to challenge the reapportionment of the House of Representatives following the 1990 decennial census. The legal and factual background of the case are explained in detail in the Jurisdictional Statement (at 2-14). We will not repeat that discussion in full here.

Briefly, as relevant here, respondents challenged the decision by the Secretary of Commerce to include in the census count for each State those federal mili-

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[1] "J.S. App." refers to the appendix to the Jurisdictional Statement that we filed on March 18, 1992, to docket the direct appeal from the judgment of the district court. No. 91-1502.

tary and civilian personnel stationed abroad who designated that State as their "home of record" when they entered military service, or who were found to have a sufficient nexus to that State under an alternative standard.[2] A person enlisting in the military designates a "home of record," which represents his or her "permanent home or actual home" at the time. See J.S. 4-5.

The district court rejected respondents' contentions that the inclusion of federal personnel abroad (and their dependents) in the enumeration on which the apportionment of Representatives among the States is based violates the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. 141). J.A. App. 80a-81a & n.31. But it nevertheless ordered that such persons be excluded from the tabulation of the 1990 census. In its view, the *manner* in which the Secretary included those persons violated the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* In so ruling, the court first rejected petitioners' submission that the statutory directive that the Secretary conduct the census "in such form and content as he may determine" means that administration of the census (including his selection of the method of allocating federal personnel abroad) is "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and therefore is not subject to judicial review. J.S. App. 69a-72a. On the merits, the court held that inclusion of personnel abroad, based on

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[2] Respondents also challenged the constitutionality of the equal proportions method prescribed by 2 U.S.C. 2a for apportioning Representatives among the States (an issue that is already before this Court in *United States Dep't of Commerce* v. *Montana*, No. 91-860 (argued Mar. 4, 1992)). The district court rejected that challenge, thereby disagreeing with the district court in the *Montana* case. J.S. App. 27a-56a.

"home of record" or comparable data, was arbitrary and capricious, because, in the court's view, the Secretary did not furnish an adequate explanation or factual justification for doing so. *Id.* at 75a-79a.

As relief, the court ordered the Executive Branch defendants, by March 31, 1992, to submit to the Clerk of the House a revised statement showing the number of Representatives to which each State would be entitled under 2 U.S.C. 2a according to the 1990 decennial census, but with all federal personnel stationed abroad (and their dependents) excluded. The court also ordered the Clerk, by April 10, 1992, to send to the Governor of each State a certification of the number of Representatives to which it is entitled under the revised statement submitted by the President to Congress. J.S. App. 94a-96a. If the judgment is allowed to stand, the consequence will be to take a Representative from the State of Washington and give that Representative to Massachusetts.

REASONS FOR GRANTING THE PETITION

1. The district court's ruling is seriously flawed. Judicial review of the manner in which the Secretary of Commerce included federal personnel stationed abroad (and their dependents) in state population totals is precluded by the political question doctrine (J.S. 17-18), the APA's exceptions for situations in which "statutes preclude judicial review" and the challenged action "is committed to agency discretion by law," 5 U.S.C. 701(a) (J.S. 19-22, 23-25), and the inapplicability of the APA to the President (J.S. 22-23). In any event, the Secretary's determination was not arbitrary and capricious. The Census Bureau specifically concluded that "home of record" best comports with the concept of "usual residence" that has traditionally guided the census and that the data to

be furnished by the Defense Department would be accurate (J.S. 25-27). Finally, even if the Secretary did not adequately explain his decision, the proper disposition was to remand the matter to the Secretary; the court had no authority to order that personnel abroad and their dependents be thrown out of the state population totals, much less to order the President to effect a new apportionment of the House of Representatives by transmitting a revised statement to Congress (J.S. 27-29).

2. On March 20, 1992, the Court noted probable jurisdiction of our direct appeal under 28 U.S.C. 1253 from the judgment of the three-judge district court.[3] On that view, the First Circuit does not have jurisdiction of petitioners' protective appeal from the same judgment, because 28 U.S.C. 1291 does not confer jurisdiction over those cases in which "a direct review may be had in the Supreme Court." Because the First Circuit does not have appellate jurisdiction under 28 U.S.C. 1291, this Court likewise does not have certiorari jurisdiction under 28 U.S.C. 1254(1), since the case is not properly "in" the court of appeals. *United States* v. *Nixon*, 418 U.S. 683, 692 (1974).

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[3] A three-judge court was properly convened in this case, because respondents' suit was one "challenging the constitutionality of the apportionment of congressional districts" within the meaning of 28 U.S.C. 2284(a). See *Montana* (No. 91-860) J.S. 25-28. Although the injunction entered by the three-judge court did not rest on constitutional grounds, the injunction nevertheless was, in the words of 28 U.S.C. 1253, entered "in [a] civil action, suit or proceeding required by an[] Act of Congress to be heard and determined by a district court of three judges," since respondents challenged the apportionment of Representatives on constitutional as well as APA grounds. See 91-1502 J.S. 16 n.7. A direct appeal therefore lies to this Court under 28 U.S.C. 1253.

However, if this Court should hereafter conclude (notwithstanding its noting of probable jurisdiction) that a direct appeal does not lie under 28 U.S.C. 1253, an appeal from the judgment of the three-judge court would lie in the court of appeals under 28 U.S.C. 1291. *Board of Regents of the University of Texas Sys.* v. *New Left Education Project*, 404 U.S. 541, 545 (1972); *Turner* v. *City of Memphis*, 369 U.S. 350, 353 (1962); *Wilentz* v. *Sovereign Camp, Woodmen of the World*, 306 U.S. 573, 582 (1939). It is for that reason that we have taken the protective appeal to the First Circuit. And we are filing this petition for a writ of certiorari before judgment to ensure that if the Court should decide at any point that it does not have jurisdiction over the direct appeal, it may grant the certiorari petition in order to render a decision this Term on the important questions presented. See *Turner*, 369 U.S. at 353-354; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 371 (1949); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 228 & n.78 (6th ed. 1986).

CONCLUSION

The Court should hold this certiorari petition pending disposition of the appeal in *Franklin* v. *Massachusetts*, prob. juris. noted, No. 91-1502 (Mar. 20, 1992). If the Court at any time concludes that it does not have jurisdiction over the direct appeal, it should grant this petition for a writ of certiorari before judgment and reverse the judgment of the district court.

Respectfully submitted.

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MARCH 1992

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No: 91-11234 WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN and KAREN J. KEPLER, PLAINTIFFS

v.

BARBARA HACKMAN FRANKLIN, as Secretary of the United States Department of Commerce; MARK W. PLANT, as Acting Undersecretary for Economic Affairs of the United States Department of Commerce;[1] THE BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, as Director of the Bureau of the Census; GEORGE HERBERT WALKER BUSH, as President of the United States; and DONNALD K. ANDERSON, as Clerk of the United States House of Representatives, DEFENDANTS

[Filed Mar. 16, 1992]

NOTICE OF APPEAL

Notice is hereby given that defendants Barbara Hackman Franklin, Mark W. Plant, the Bureau of the Census, Barbara Everitt Bryant and George Herbert Walker Bush hereby appeal, pursuant to 28

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[1] Barbara Hackman Franklin is substituted for Robert Mosbacher and Mark W. Plant is substituted for Michael Darby in accordance with Federal Rule of Civil Procedure 25(d).

U.S.C. § 1291, to the United States Court of Appeals for the First Circuit from the Final Decrees and Orders, dated February 20, 1992, and March 13, 1992, of the United States District Court for the District of Massachusetts in the above-captioned case.

Respectfully submitted,

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